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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 37

ALLEN I. NILVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (S. R. 72–81) is reported at 227 F. 2d 74. Its opinion on petition for rehearing (S. R. 99–100) is reported at 228 F. 2d 134. A memorandum opinion of the District Court (S. R. 48–50) is reported at 228 F. 2d 134.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955 (S. R. 82) and a petition for rehearing was denied on December 21, 1955 (S. R. 100–101). On January 16, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 18,

1956 (R. 101–102). The petition for a writ of certiorari was filed February 17, 1956, and was granted April 2, 1956 (R. 102). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

1. Whether there was sufficient competent evidence to sustain petitioner's conviction for criminal contempt, under 18 U. S. C. 401 (3) and Rules 17 (g) and 42 (b) of the Federal Rules of Criminal Procedure, on Specification No. 3.

2. Whether the procedure by which petitioner was adjudged guilty of Specification No. 3 was proper.

STATUTE AND RULES INVOLVED

18 U. S. C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
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> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
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> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Pertinent Federal Rules of Criminal Procedure are as follows:

> Rule 17. *Subpoena.*
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> * * * * * *
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> (c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS. A subpoena may also command the person to whom it is directed to

produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

(g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issues if it was issued by a commissioner.

Rule 42. *Criminal Contempt.*

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The

notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involved disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

At a trial of petitioner, Christianson, and Paster in the United States District Court for North Dakota for conspiracy to violate the Federal Slot Machine Act (15 U. S. C. 1171–1177), petitioner was acquitted, but the jury disagreed as to the other two defendants. In preparation for the retrial of petitioner's two co-defendants (hereinafter called the Christianson retrial), the court issued subpoenas duces tecum directed to the Mayflower Distributing Company, a corporation wholly owned by Paster, to produce records of its sales of slot machines. Subpoena No. 78 called for production of records relating to transactions with several named persons from November 1950 to August 1951 (R. 26–27). Subpoena No. 160 called for production of various records including invoices, checks, letters, ledger sheets, bookkeeping records and journals, for the period from July 1, 1950 to

April 30, 1951, reflecting purchases, sales and transfers of slot machines and coin-operated devices (R. 24–25). The return date of both subpoenas was finally fixed at March 29, the date of the opening of the Christianson retrial. On that date, prior to the beginning of the Christianson retrial, Paster moved the court for an order quashing both subpoenas. This was denied. Pursuant to a government motion then orally made under Rule 17 (c), F. R. Crim. P. (*supra*, pp. 2–3), the court ordered that the books and records designated in the subpoenas be produced forthwith (S. R. 27–28).[1] Counsel for defendant Paster indicated that the order would be obeyed (S. R. 26). Several days later, when government counsel inquired as to when the records would be produced, Paster's counsel stated that this would be done the following day [April 1] (R. 5). Petitioner, an attorney, had entered an appearance as co-counsel for Paster (R. 61).

On April 1, 1954, petitioner, who was also vice-president of Mayflower, voluntarily appeared in answer to the two subpoenas duces tecum (Nos. 78 and 160) and the order to produce forthwith, and testified that he had "brought all the records that [he] could that those subpoenaes [sic] asked for" (R. 8–9). (Certain records were produced (R. 54), inspected by the government, and turned back to the secretary of Mayflower (S. R. 42).) Asked whether Mayflower had purchased used slot machines during January 1951, petitioner stated that those records were in the Court

[1] References designated "S. R." are to the Supplemental Record filed in the Court of Appeals by the government.

already pointed out, however, this testimony is of no significance in relation to the charge of non-production of records, the existence of which was established by the introduction of the first four records in evidence and the presence of the other records in the courtroom. If petitioner had wished to show, in establishing his excuse for not producing the records, that they were difficult to locate and that the government had trouble in finding them, it was his duty, and not the government's, to call Agent Peterson. So far as the proof of the government's case is concerned, the testimony of Peterson added nothing to the proof of the only fact that had to be proved—that the records were in existence at the time the subpoena was served. The fact of existence was proved by the books themselves and was not disputed.

2. Petitioner also urges that he was not given sufficient time to prepare his reply to the order to show cause why he should not be adjudged guilty of contempt. The sole disputed issue before the court with respect to Specification No. 3 was whether or not petitioner had an adequate excuse for his known failure to produce the records called for by the subpoena. That he had ample time both to comply with the subpoena and to show his excuse for noncompliance is clear from the record. Subpoena No. 78 was served on the Mayflower

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right of confrontation, it may be well to point out that the violation appears to have been more technical than real. The agent's testimony was based upon summaries made from the records which were either in evidence or physically before the court. Before the contempt hearing, the court ordered that petitioner's counsel have access to those records (R. 35). There never was, and still is, no contention that Agent Peterson's testimony was inaccurate.

Distributing Company on March 1, 1954, and originally made returnable March 22, 1954 (R. 26–28). Subpoena No. 160 was served on the company on March 25, 1954, and made returnable on March 29, 1954 (R. 24–25). By April 1, when the hearings were held in chambers, petitioner had had 31 days to comply with subpoena No. 78 and six days to comply with subpoena No. 160. Petitioner admitted seeing the latter subpoena shortly after it was served (R. 41, 63). By his own admissions he had spent only "several afternoons and a couple of evenings" trying to comply (R. 19). If he had found it impossible to comply with the subpoenas, he should have stated his reasons for noncompliance on April 1, 1954. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 551; *United States* v. *Bryan*, 339 U. S. 323, 333. Instead, petitioner asserted that he had complied as well as he could (R. 9).

On the twelfth day of the Christianson retrial, April 15, 1954, when the existence of the records called for in subpoena No. 160 was unmistakably known, the trial court met in chambers at the request of petitioner in the presence of defense and government counsel (S. R. 39–44). At that time the court ordered petitioner not to leave the jurisdiction of the court without the court's permission (S. R. 39). Government counsel then interrogated petitioner as to his testimony given in chambers on April 1, 1954, relative to compliance with the subpoenas (S. R. 39–40). Thus it was made apparent to petitioner on April 15, 1954, that the trial court intended, at the completion of the Christianson retrial, to take some action against him because of his noncompliance with the subpoenas (S.

R. 44).[7] He had already retained counsel to represent him in the matter of his compliance with the subpoenas (S. R. 43). Eight days later, on April 23, 1954, petitioner was served with the order to appear on April 27, 1954, and show cause why he should not be adjudged guilty of contempt (R. 2–4).

On the morning of April 27, 1954, when the contempt case was called, petitioner, through his counsel, objected that insufficient time had been allowed to prepare a defense and requested an extension (R. 33). The court granted petitioner until 3:00 p. m. of the same day to examine the impounded records which were in evidence in the court (R. 35). When the proceeding resumed at 3:00 p. m., petitioner testified that he had examined some of the impounded records and then identified them (R. 48, 46–57). It is thus clear that petitioner had ample notice that he was to be charged with willful failure to produce the records and ample time to prove an excuse, if he had such an excuse. Significantly, he failed to adduce the type of evidence which would substantiate his own testimony that he had made diligent search of the records with the aid of others; he called no witnesses to testify to his efforts in this regard. And, it should be noted, the availability of such proof would in no way be affected by examination of the contents of the records.

[7] The only significance of the supplemental record before the Court of Appeals for the purpose of this specification (No. 3) was to bring before that court the formal matters, such as the April 15 hearing, which were matters of record known to all parties in the District Court. Petitioner's complaint that the Court of Appeals should not have considered the supplemental record (Br. 53–54) is therefore without merit insofar as it relates to specification No. 3.

From the day that petitioner testified on April 1, 1954, he was on notice that his production was not deemed compliance. From the time of the order to remain in the jurisdiction on April 15, 1954, he was on notice that proceedings would probably be instituted against him. He had notice of the formal charges from April 24 to 27. This procedure accords with the decision of this Court in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 551, in which it stated:

> * * * So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded. * * *

See also *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916, where the defendant was instructed to produce records before a grand jury at 10:00 a. m. When he failed to produce the records at that time, asserting that he did not know where they were, the court immediately proceeded with a hearing and adjudged defendant guilty of contempt, sentencing him to 18 months' confinement. The Court of Appeals, in overruling the defendant's contention that he had not been accorded ample time to prepare his defense, pointed out that defendant "was advised from the beginning that he must produce the books or prove by convincing evidence his inability to produce them. * * *" (216 F. 2d at 92). Here petitioner had more than adequate notice of the charges and more than adequate time to prepare his excuses or defense.

II

PETITIONER IS NOT ENTITLED TO A NEW TRIAL ON HIS CONVICTION FOR CONTEMPT

It is a general rule in criminal cases that, if a general sentence on several counts is within the limits that may be imposed on any one count, that count alone will support the verdict. On this basis petitioner's sentence may be supported on Specification No. 3, without reference to the other two specifications. *Pinkerton* v. *United States,* 328 U. S. 640, 641–642, fn. 1; *Abrams* v. *United States,* 250 U. S. 616, 619; *Powers* v. *United States,* 223 U. S. 303, 312; *Dunbar* v. *United States,* 156 U. S. 185, 192. We think that the rule is peculiarly appropriate in this case for it seems clear that the sentence was fixed at a year and one day, not because there were three specifications, but because of the general act of disobedience represented by the willful flouting of the subpoena with the evident purpose of affecting the evidence at the Christianson retrial. The refusal to place petitioner on probation was based by the District Court, not on the multiplicity of offenses, but on the fact that petitioner, as an attorney, undertook the type of action which "strikes at the very roots of our court system and damages the general repute of the legal profession" (S. R. 50). Under these circumstances, we see no occasion for remand of the case for resentencing.

However, since we do not undertake to sustain the convictions on two of the specifications, the Court may wish to remand the cause to the District Court for reconsideration of the sentence in the light of the

conviction on one specification alone. Our main position on this aspect of the case is that this would be the maximum relief to which petitioner would be entitled. He does not, as he claims, have a right to a retrial on his conviction under Specification No. 3.

Petitioner relies on dictum in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, for his argument that, if his conviction on any count is found to be erroneous, the whole conviction should be set aside. The actual holding of that case was that the prison sentences could not be sustained because the defendants had been proceeded against by civil, rather than criminal, contempt. See 221 U. S. at pp. 451–452. In the course of the opinion, however, the court did say, as to the rule in criminal cases discussed above (221 U. S. at p. 440):

> That rule originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction.
>
> But there is no room for such presumption here. The trial judge made no general finding that the defendants were guilty. But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts he consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the

> defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that having found them guilty of these nine specific acts he did not impose some punishment for each. Instead, therefore, of affirming the judgment, if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

We question the validity of that dictum. The general rule in criminal cases has been applied to convictions by the court, acting as the trier of fact without a jury. *Whitfield* v. *Ohio,* 297 U. S. 431, 438; *United States* v. *Empire Packing Co.,* 174 F. 2d 16, 19 (C. A. 7), certiorari denied, 337 U. S. 959. It has been applied where a court has refused to set aside the verdict on counts ultimately held defective by the appellate court, so that it is impossible to rationalize the general rule on the presumption given in the *Gompers* case that the court rejected the bad counts. See *Pinkerton* v. *United States,* 328 U. S. 640, 641, where the Court of Appeals had held that a demurrer to certain counts had been improperly overruled by the District Court; see also *Haynes* v. *United States,* 101 Fed. 817 (C. A. 8). It seems that the true rationale is that, particularly where the counts are related, the presumption is that, with only one count before him, the judge would have imposed exactly the sentence which he did impose. Certainly that is a valid rationale in a case, such as this, where the

penalty is for one transaction even though many offenses may be involved.

In any event, all that the *Gompers* dictum states is that there must be a reversal of the judgment, with what further results it does not say. We submit that, even under the *Gompers* rationale, the reversal of the judgment would be for resentencing on the good count, and not for retrial on that count. Since the judge found petitioner guilty on all three specifications separately, there is no reason for a retrial on the third count where the conviction was properly obtained on sufficient evidence. The rule set forth by the Court in *Stromberg* v. *California,* 283 U. S. 359, 367–368, and *Williams* v. *North Carolina,* 317 U. S. 287, 291–292, is inapposite here. Those cases concerned a general verdict and not, as in this case, a general sentence. In neither of those cases was it possible to tell from the general verdict on which of several possible theories the jury relied. Since one of each set of theories involved in each case was fatally defective, a general verdict, which could have rested on the defective theory, was also defective, and the guilt of the defendant had to be retried. In the present case, however, petitioner was tried for contempt on three specifications, each involving a different theory, and separately found guilty on each. No sound purpose can be advanced for retrying petitioner on the good specification just because the other two theories are held defective. Any prejudice that may have accrued to petitioner from the finding on a defective specification can be corrected by remanding the case to the trial court for resentencing.

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

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